UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

KENNETH FRANCO, M.D., Plaintiff, -against- YALE UNIVERSITY, in its own capacity and acting through THE YALE UNIVERSITY SCHOOL OF MEDICINE; JOHN ELEFTERIADES, M.D.; GARY KOPF, M.D.; and RONALD MERRELL, M.D., Defendants.	**3:00 CV 1927 (GLG)** **MEMORANDUM DECISION**

Plaintiff has filed a three-part motion for recusal, default judgment, and related relief [**Doc. #63**]. The related relief is an application for reconsideration of the Court's Order of September 9, 2001, regarding a cross-motion to compel discovery and includes a request for designation of a date for defendant to file opposition to the cross-motion. As a motion for reconsideration, it is clearly not timely, having been filed one month after the Order was entered, while the Local Rules require motions for reconsideration to be filed within 10 days. See D. Conn. L. Civ. R. 9(e)1. Consequently, that portion of the motion [**Doc. #63-3**] is hereby **Denied**.

MOTION FOR RECUSAL

Plaintiff seeks the recusal of this Court pursuant to 28 U.S.C. § 455(a) on the grounds that the Court's impartiality might be reasonably questioned and "circumstances show a deep-

seated antagonism toward the plaintiff which would make fair judgment almost impossible." (Plaintiff's Memorandum of Law ("**MOL**") at 1.) Initially, we note that this motion derives from the Court's rulings on a series of motions filed last year. Indeed, the recusal motion would have to be based on these rulings, since this Court does not know plaintiff, has never met him, nor had any communications with either plaintiff or his counsel other than by decisions in the case. Should there be any question in this regard, the following comments in Plaintiff's Memorandum of Law concerning the Court's decisions certainly demonstrate it:[1]

> The Court . . . went out of its way to be derisive, if not contemptuous, of plaintiff's suit. (MOL at 2.)
>
> The Decision exhibited more the partisanship of an opponent's brief than the balance of a judicial opinion. Being both snide and demeaning, and conspicuously pro-defendant . . . . (MOL at 3.)
>
> The Decision . . . contained numerous errors attesting to judicial haste, disconcern, inattention or careless misunderstanding . . . (MOL at 3.)
>
> Sarcasm, Ridicule and Contempt . . . Clearly Demonstrate the Court's Refusal to Apply Applicable Law no Less than Its Deep-seated Antagonism Toward Plaintiff. (MOL at 8.)
>
> The Court pays lip service to the rule of favorable inferences . . . only to flaunt it throughout. . . . This is neither a fair nor even tentatively feasible inference, but a base and deprecating aside (MOL at 9.)

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[1] These descriptions of the Court's rulings might seem to some to be a contempt of Court. That, however, is not an issue presented by the instant motion.

> The Court's bias is further apparent in the begruding, inference-defeating, and legally insupportable manner in which it ultimate (but only barely) sustained plaintiff's breach of contract claim. (MOL at 10.)
>
> [T]he Court's anti-plaintiff bias is further apparent in multiple misstatements of varying kinds and degree; indeed, in a cavalier disregard for accuracy itself . . . (MOL at 11.)
>
> Other examples of carelessness equating to indifference and, thus, bias are . . . (MOL at 13.)

Despite all of these derisive references to the Court's decisions, plaintiff nevertheless argues that "the sources of the judge's bias here appear primarily extrajudicial." (MOL at 6.) The only thing that plaintiff points to which could possibly be extrajudicial is plaintiff's claim that the Court has an "unseemly," "unwarranted," and insurmountable envy of plaintiff's salary. (MOL at 6.) This remarkable claim derives from a footnote in the Court's August 10, 2001 ruling, in which the Court, after recounting plaintiff's allegations concerning his declining salary,[2] noted that plaintiff's penurious salary was substantially more than federal judges are paid, as indeed it was. While the salaries of federal judges, and for that matter Congress (which receives the same by virtue of its imposed linkage of the two salaries), are probably less than those

[2] Plaintiff alleged in his amended complaint that his salary had declined from $260,000 in the 1993/1994 school year to $188,000, during his last few years at the Hospital, and as a result, he had spent his life savings and all tax rebates and had incurred significant debt in order to support himself and his family. (Am. Compl. ¶¶ 35, 36.)

positions warrant, considering their importance and all other factors leading to the occupancy of these positions, no one has ever suggested that our pay is "penurious." Nothing in the Court's comment, however, even remotely suggests envy by this Judge that plaintiff was making more than a federal judge (and is now making four times a federal judge's salary). Only an extreme, and perhaps intentional, misreading of that footnote would support such an argument. We conclude, therefore, that the only basis for the claim of bias and support for the recusal motion are the Court's earlier rulings in this case.[3]

Title 28 of the United States Code, section 455(a), requires a federal judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The Supreme Court has held that this "'catchall' recusal provision, covering both 'interest or relationship' and 'bias or prejudice' grounds,"

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[3] Indeed, plaintiff implicitly concedes this fact in his reply brief, in which he states that his motion is based on the following factors:

> invidious statements concerning plaintiff's salary; repeated and legally insupportable criticisms of the length of plaintiff's submissions; a snide and demeaning tone lacking in disinterest and defeating the requirement that all favorable inferences be afforded plaintiff; refusal to apply governing law . . . ; refusal on key issues to consider, apply and have decisions meaningfully reflect reported cases; reliance on unreported cases . . . ; multiple errors and carelessness bespeaking disconcern the equivalent of bias . . . .

(Reply MOL at 1-2)(original emphasis).

requires all of these factors "to be evaluated on an objective basis." Liteky v. United States, 510 U.S. 540, 548 (1994)(original emphasis)(citations omitted); see also United States v. Bayless, 201 F.3d 116, 126 (2d Cir.)("Notably, under § 455(a), recusal is not limited to cases of actual bias; rather the statute requires that a judge recuse himself whenever an objective, informed observer could reasonably question the judge's impartiality, regardless of whether he is actually partial or biased."), cert. denied, 529 U.S. 1061 (2000).

"The decision whether to grant a recusal motion is a matter confided to the sound discretion of the district court." McCann v. Communications Design Corp., 775 F. Supp. 1506, 1522 (D. Conn. 1991), reconsideration denied, 1992 WL 336760 (D. Conn. Oct. 1, 1992). In making that decision, the Court is to examine the record facts and law, and then decide whether a reasonable person, knowing all the facts and circumstances, would conclude that the trial judge's impartiality could reasonably be questioned. United States v. Bayless, 201 F.3d at 126 (citing Diamondstone v. Macaluso, 148 F.3d 113, 120-21 (2d Cir. 1998)). The ultimate inquiry under § 455(a) is whether circumstances create an objectively reasonable basis for questioning a judge's impartiality, by showing "a deep-seated favoritism or antagonism that would make fair judgment impossible." Liteky, 510 U.S. at 555.

Additionally, it has always been the law that "judicial

rulings alone almost never constitute a valid basis for a bias or partiality motion." Id. Only in the "rarest circumstances" will such rulings evidence the degree of favoritism or antagonism required for recusal when no extrajudicial source is involved. Id.; see also United States v. Arena, 180 F.3d 380, 398 (2d Cir. 1999)("Adverse rulings in other litigation or the same litigation involving the party seeking recusal generally do not constitute a basis for recusal."), cert. denied, 531 U.S. 811 (2000). As the Supreme Court explained, judicial remarks during the course of litigation that are "critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." Liteky, 510 U.S. at 555 (original emphasis).

In his reply memorandum, plaintiff argues that the requirement of extrajudicial bias no longer exists, at least as it pertains to motions under § 455(a). Plaintiff describes the contrary authority adduced by Yale as having been "disapproved, superseded or implicitly overruled." (Reply MOL at 8.)[4] Plaintiff is correct that the presence of an "extrajudicial

[4]Indeed, plaintiff claims that the defendant's counsel should be sanctioned for arguing to the contrary. That motion is **Denied**.

source factor" is not an absolute requirement for recusal under § 455(a), but, as discussed above, the Supreme Court has made clear that it is only in the "rarest circumstances" that judicial rulings alone will evidence the degree of favoritism or antagonism required for recusal under § 455(a). See Liteky, 510 U.S. at 555; see also In re. International Business Machines Corp., 45 F.3d 641, 644 (2d Cir. 1995).

In support of his position, plaintiff cites Jackson v. Microsoft, 135 F. Supp. 2d 38, 40 (D.D.C. Mar. 12, 2001), in which plaintiff states that Judge Jackson "applied the 'reasonable person' standard . . . for evaluating whether certain of his comments would make him appear unable to impartially evaluate the testimony offered, . . . and recused himself because those same comments 'created an appearance of personal bias or prejudice.'" (MOL at 8)(original emphasis)(internal citations omitted). What plaintiff ignores, however, is that Judge Jackson's remarks concerning the Microsoft case came in public extrajudicial statements made to the media. As the Court of Appeals stated,

> The problem here is not just what the District Judge said, but to whom he said it and when. His crude characterizations of Microsoft, his frequent denigrations of Bill Gates, his mule trainer analogy as a reason for his remedy – all of these remarks and others might not have given rise to a violation of the Canons or of § 455(a) had he uttered them from the bench. . . . It is an altogether different matter when the statements are made outside the courtroom, in anticipation that ultimately the Judge's remarks would be reported. Rather than manifesting neutrality and

> impartiality, the reports of the interviews with the District Judge convey the impression of a judge posturing for posterity, trying to please the reporters with colorful analogies and observations bound to wind up in the stories they write. Members of the public may reasonably question whether the District Judge's desire for press coverage influenced his judgments, indeed whether a publicity-seeking judge might consciously or subconsciously seek the publicity-maximizing outcome. We believe, therefore, that the District Judge's interviews with reporters created an appearance that he was not acting impartially, as the Code of Conduct and § 455(a) require.

United States v. Microsoft Corp., 253 F.3d 34, 115-16 (D.C. Cir. June 28, 2001)(argued Feb. 26 and 27, 2001).[5] In fact, Judge Jackson specifically declined to recuse himself because of comments made in the course of the litigation. See Note 5, supra.

In the instant case, there have been no extrajudicial comments by this Court. There have been no "extrajudicial source" factors that have created any bias or prejudice on the

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[5] Jackson v. Microsoft Corp., 135 F. Supp. 2d 38 (D.D.C. 2001), cited by plaintiff, was decided prior to the Court of Appeals' decision in United States v. Microsoft, 253 F.3d 34 (D. C. Cir. 2001), but after oral argument had been heard by the appellate court. District Judge Jackson specifically stated that he was not granting the motion for recusal based upon his opinions concerning Microsoft that he held as a result of what he learned during the proceedings. He found that these opinions did not rise to the level of deep-seated and unequivocal antagonism that would render fair judgment impossible, so as to require his recusal under § 455(a). Jackson, 135 F. Supp. 2d at 40 (citing Liteky, 510 U.S. at 556). However, he acknowledged that the "extra-judicial comments attributed to [him], when viewed in light of the public disapproval thereof expressed by the court of appeals at oral argument of the Microsoft cases appeal, have created an appearance of personal bias or prejudice." Id. For that reason, he granted the motion for recusal. Id.

part of the Court. See Liteky, 510 U.S. at 555. All statements made by this Court were contained in decisions in this litigation. The Court neither relied upon knowledge acquired outside these proceedings in rendering these decisions, nor could these decisions be viewed objectively, by a reasonable person with knowledge of all the facts and circumstances, as displaying such "deep-seated and unequivocal antagonism that would render fair judgment impossible." See Id. at 556. In actuality, what plaintiff seems to be challenging is the legal basis for this Court's decisions. See Note 3, supra. These are grounds for appeal, not recusal.

As this Court has recognized, "[i]t is vital to the integrity of the system that a judge not recuse himself on unsupported, irrational or highly tenuous speculation." McCann, 775 F. Supp. at 1523. Recusal motions should not be used as strategic devices to "judge shop." Id. at 1522. Further, a judge must be free to make rulings on the merits in a case without the apprehension that if he rules unfavorably to one litigant, he may have created the impression of bias or impartiality. Id.

In this case, there is no basis for recusal because of judicial bias or impartiality, and plaintiff's motion for recusal is in all respects **Denied** [**Doc. #63-1**]

MOTION FOR DEFAULT JUDGMENT

Plaintiff next moves for a default judgment. The claim that there should be a default judgment is based on the following chronology.

Defendant filed a motion to dismiss. That motion was granted in part and denied in part. Plaintiff then promptly filed a motion for reconsideration. Within ten days after the motion for reconsideration was decided, defendant filed its answer. Defendant argues that it was not required to answer while the motion for reconsideration was pending. Neither side cites any authority to support its position. That is not surprising since motions for reconsideration are not authorized by the Federal Rules of Civil Procedure or by Title 28, United States Code. Motions for reconsideration, however, are authorized by local rules, including the Local Rules of Civil Procedure of the District of Connecticut. See D. Conn. L. Civ. R. 9(e). That authorization, however, does not touch upon whether a motion to reconsider a ruling on a motion to dismiss extends the time for filing an answer until the motion for reconsideration is decided. See Ware v. United States, 154 F.R.D. 291. 293 (M.D. Fla. 1994)(noting that the law is unclear as to the effect of a motion for reconsideration on the time allowed for answering an amended complaint).

Logic dictates that, if the motion for reconsideration is made by the defendant, its time for answering should be extended until the motion for reconsideration has been decided since, if

the reconsideration leads to the dismissal of the entire complaint, there is no need for an answer. That logic would not necessarily apply when it is the plaintiff moving for reconsideration and not the defendant.

Nevertheless, we see no need to decide that issue since plaintiff has failed to demonstrate any prejudice because of what he claims is a late answer. Default judgments are not favored, particularly for isolated, unintentional pretrial violations. Cody v. Mello, 59 F.3d 13, 15 (2d Cir. 1995). In addition, "because defaults are generally disfavored and are reserved for rare occasions, when doubt exists as to whether a default should be granted . . . , the doubt should be resolved in favor of the defaulting party." Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 96 (2d Cir. 1993). Consequently, the motion for default judgment is **Denied** [**Doc #63-2**].

CONCLUSION

Accordingly, all three of plaintiff's motions [**Doc #63**] are **Denied**.

SO ORDERED.

Dated: January 9, 2002.
Waterbury, Connecticut.

_____/s/_____
GERARD L. GOETTEL,
United States District Judge